(13)

No. 96-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,
Petitioners,
v.
GEORGE WINDSOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RHONE-POULENC RORER INC., ARMOUR PHARMACEUTICAL COMPANY, BAYER CORPORATION, BAXTER HEALTHCARE CORPORATION AND ALPHA THERAPEUTIC CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following issue: Should the fact that a case cannot be litigated as a nationwide class action preclude the parties from entering into a nationwide class settlement, even if absent class members are given adequate notice of their rights and the district court concludes that the settlement is fair to all parties?

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INTEREST OF *AMICI CURIAE*

Amici curiae Rhône-Poulenc Rorer Inc., Armour Pharmaceutical Company, Bayer Corporation, Baxter Healthcare Corporation, and Alpha Therapeutic Corporation respectfully submit this brief in support of petitioners and urge the Court to reject the radical reinterpretation of Rule 23 adopted by the United States Court of Appeals for the Third Circuit.

Amici are pharmaceutical companies that process plasma to isolate the components used to treat hemophilia. *Amici* have been sued by more than 1,300 persons

who claim that they or a family member were exposed to the human immunideficiency retrovirus ("HIV") through those therapies.

After nearly a decade of hard-fought litigation, *amici* reached a settlement with a nationwide class of hemophiliacs, their relatives, and other representatives. *Amici* App. 1-17a. The settlement, which has received the preliminary but not the final approval of the district court, would pay 100 thousand dollars to each eligible member of the class.

Under the reasoning of the Third Circuit, this 600 million dollar cash settlement could not be given final approval—even if the court concludes that the settlement is fair to class members—because the court could not certify the settlement class. Certification would be barred because the hemophiliacs' claims cannot be litigated through a class action. *See Wadleigh v. Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410 (N.D. Ill. 1994) (refusing to certify a nationwide class pursuant to Fed. R. Civ. P. 23(b)(3), but certifying an issue class pursuant to Fed. R. Civ. P. 23(c)(4)(A)), *rev'd in part sub nom. In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.) (directing district court to vacate the issue class certification), *cert. denied sub nom. Grady v. Rhône-Poulenc Rorer Inc.*, 116 S. Ct. 184 (1995). If, as the Third Circuit states, "a class is a class is a class," there can be no classwide settlement because classwide litigation is impossible. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996).

Neither the language of Rule 23 nor considerations of fairness to absent class members requires such a result. Therefore, *amici* urge this Court to reject the Third Circuit's rewriting of class action law, and to hold that settlement classes may be approved when absent class members have adequate notice and the opportunity to opt out of the settlement, and when the district court concludes that the settlement is fair.

BACKGROUND

1. Hemophilia is an incurable, hereditary disorder characterized by deficiencies of certain clotting factors in the blood. In the late 1960s and early 1970s, freeze-dried and concentrated forms of the missing clotting factors were developed and largely replaced the cumbersome and less effective therapies that had previously been used. These new therapies greatly increased the life expectancy and quality of life for persons with hemophilia.

The disease now known as Acquired Immune Deficiency Syndrome (AIDS) was diagnosed in three hemophiliacs in 1982. By 1984, the medical community had reached a consensus that AIDS was transmissible by blood, blood components and other bodily fluids. *In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). The HIV retrovirus was identified as the cause of AIDS in the spring of 1984.[1] In March of 1985 the FDA licensed a test to detect antibodies to HIV in blood. All plasma donations collected after the test became available were tested and HIV positive donors were excluded. *Id.*

2. Approximately 500 lawsuits involving some 1,300 named plaintiffs have been filed by persons with hemophilia who claim to have been infected with HIV through the plasma-based therapies used to control their hemophilia. Approximately 60 percent of the cases are pending in various state courts. The federal cases have been consolidated for pretrial purposes in the Northern District of Illinois. *In re "Factor VIII or IX Concentrate Blood Products" Prod. Liab. Litig. (MDL No. 986)*, 853 F. Supp. 454 (J.P.M.L. 1993). *See generally* 28 U.S.C. § 1407. The parties have conducted substantial discovery, including the production of over one million documents

[1] Later that year, experiments by the Centers for Disease Control demonstrated that HIV could be inactivated by heat-treatment processes that had recently been approved for certain factor concentrates.

and the depositions of factual, medical and scientific witnesses.

On September 30, 1993, a consortium of plaintiffs' counsel filed *Wadleigh v. Rhône-Poulenc Rorer*, No. 93 C 5969 (N.D. Ill.)—a purported nationwide class action against *amici* and the National Hemophilia Foundation. The district court denied plaintiffs' motion to certify a nationwide class pursuant to Federal Rule of Civil Procedure 23(b)(3). The court concluded, *inter alia*, that plaintiffs' negligence claims could not be certified because common issues of fact and law did not predominate "[o]n the proximate cause issue." However, the district court certified an issue class pursuant to Rule 23(c)(4)(A) for the purpose of determining whether the defendants were "guilty of ordinary negligence." *Wadleigh v. Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410, 424 (N.D. Ill. 1994). The court planned to try this issue using a uniform national negligence instruction and then remand individual cases to the districts from which they originated for adjudication of individual causation and damage issues.

3. The Seventh Circuit issued a writ of mandamus directing the district court to vacate its class certification order. *In re Rhône-Poulenc Rorer*, 51 F.3d at 1293. The court of appeals concluded that the proposed class action "far exceed[ed] the proper bounds of judicial discretion" in three ways. *Id.* at 1299. First, the district court violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), by proposing "to have a jury determine the negligence of the defendants" pursuant to "a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia." *In re Rhône-Poulenc Rorer*, 51 F.3d at 1300. Second, the district court's plan violated the Seventh Amendment because the court intended to try, on a classwide basis, "negligence" issues that were inextricably interwoven with proximate cause, comparative negligence and other issues

that would be addressed in the individual local trials. *Id.* at 1302-03. Third, the district court violated Rule 23 by certifying a class when class litigation was a manifestly inferior means for fair and efficient adjudication of these claims. *Id.* at 1299-1300.

4. Plaintiffs' application for *certiorari* was denied. *Grady v. Rhône-Poulenc Rorer, Inc.*, 116 S. Ct. 184 (1995). On January 16, 1996, the district court decertified the class.

5. Plaintiffs and *amici* then entered settlement negotiations. In August of 1996, the parties agreed on the terms of a nationwide settlement that would pay 100 thousand dollars (exclusive of fees and costs) to each HIV-positive hemophiliac who used factor concentrates processed or distributed by *amici* during the period 1978 through 1985.[2] The settlement would be implemented through conditional certification of a class for settlement purposes in *Walker, et al. v. Bayer Corp., et al.*, 96 C 5024 (N.D. Ill.).

On August 14, 1996, the district court made a preliminary finding that the settlement was sufficiently fair, reasonable and adequate to issue class notice. Approximately 6,200 claims[3] were subsequently filed by persons who wanted to participate in the settlement. Approximately 540 persons opted out of the settlement class.

On November 25, 1996, the district court commenced a hearing to determine whether the settlement was fair to the settlement class. The court reserved final approval of the settlement pending resolution of certain subrogation and government benefits issues. *Amici* App. 18a.

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[2] The settlement class would also include family members and other representatives of deceased hemophiliacs and persons who contracted HIV through sexual relations with a spouse or eligible partner. The precise terms of the settlement appear in the Notice of Settlement appended to this brief. *See Amici* App. 4-17a.

[3] This number is an estimate based upon the settlement administrator's preliminary analysis of claim forms submitted.

ARGUMENT

The Third Circuit has engaged in a judicial revision of Rule 23 that is unsupported by the language of the Rule and inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072(b). If this Court adopts the Third Circuit's reasoning, numerous fair and reasonable settlements—including this 600 million dollar settlement with thousands of HIV-positive hemophiliacs—will be outlawed. *Amici* do not dispute that settlement classes can be abused. However, they believe that any such abuses can be prevented through vigorous judicial enforcement of the procedures for approval of a class settlement. The Court need not and should not engraft new requirements onto Rule 23.

I. THE THIRD CIRCUIT'S INTERPRETATION OF RULE 23 BLOCKS PARTIES FROM MAKING INFORMED DECISIONS TO SETTLE LITIGATION, IN VIOLATION OF THE RULES ENABLING ACT.

Rule 23 does not outlaw settlement classes. Rather, it describes the "prerequisites to a class action" that must be "satisfied" for a class action to be "maintainable." The district court's decision to certify a class is a discretionary one, based on the *specific circumstances of a case*. *General Tel. Co. v. Falon*, 457 U.S. 147, 160 (1982). As those circumstances change, the certification decision is subject to reconsideration. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

The Third Circuit has loosed Rule 23 from its pragmatic moorings. Instead of applying Rule 23(a) and 23(b) based on the facts—including the fact that the parties have negotiated a settlement—the Third Circuit requires a district court to apply Rule 23 based on a false hypothesis. The court must disregard the parties' stated intention to compromise their claims and apply Rule 23 as if the parties intend to take their dispute to trial. Only if a class trial would be fair and manageable may the court certify the class and allow parties to enter a global settlement.

Such an interpretation violates the Rules Enabling Act, which provides that rules of procedure cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The only distinction between settlement in Rule 23 and other cases is that, "[u]nlike the settlement of most private civil actions, class actions may be settled only with the approval of the district court." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 623 (9th Cir. 1982). *See* Rule 23(e). The Third Circuit's interpretation of Rule 23 deprives litigants in putative class actions of an opportunity available to everyone else who comes to court: the right to settle their claims.

The very essence of a settlement is compromise—on both legal and factual differences. "The parties waive their right to litigate the issues involved in the case and save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise . . ." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (discussing consent decrees). *See also Mars Steel Corp. v. Continental Illinois Nat. Bank and Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987) (analogizing settlement to a contract, where "normally the test for the fairness of a contract is strictly procedural: were the parties competent adults duly apprised of the basic facts relating to their transaction").

In the context of the Seventh Circuit's decision in *In re Rhône-Poulenc Rorer*, 51 F.3d 1294, the Third Circuit rule would prevent sophisticated defendant corporations from settling claims that they want to settle. The Seventh Circuit identified three significant obstacles to class certification in the AIDS/hemophilia litigation: 1) "forcing defendants to stake their companies on the outcome of a single jury trial" or forcing them to settle even if they have no legal liability, *id.* at 1299; 2) subjecting defendants to a uniform standard of negligence where differences in various states' law "could make a big difference in the liability of these manufacturers," *id.* at 1301-02; and

3) risking a violation of defendants' Seventh Amendment right to trial by jury if there were inconsistent verdicts. *Id.* at 1303-04.

The Seventh Circuit instructed the district court to vacate its certification order because a class trial would be unfair to *amici*. Under the Third Circuit's interpretation of Rule 23, however, *amici*—who are certainly sophisticated litigants—would be denied the opportunity to compromise on these issues in furtherance of a global settlement. For example, when *amici* present the district court with what they—and the plaintiffs—believe to be a fair negotiated settlement, the Seventh Circuit's concern that the companies could be "forced" into a settlement by improper class certification disappears. To blindly apply the Third Circuit's "litigation rule" would be absurd unless *amici* were unable to adequately protect their own interests in these settlement negotiations. *See In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987) ("the issue of whether class treatment is appropriate is one that the parties can settle or compromise").

If *amici* want to settle, they should be allowed to overlook choice of law objections that they would have made in the litigation context. Negotiated choice-of-law provisions are not unusual. *See Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992) ("contractual choice of law provisions are usually honored"). Nor is it uncommon for courts to allow parties to waive objections to "choice-of-law issues" by failing to raise them at an early stage in the proceedings. *See Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216, 221 (7th Cir. 1996); *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 180 (3d Cir. 1995) ("choice of law issues may be waived"). There is nothing in Rule 23 that should abridge or modify a party's right to waive or negotiate around any applicable choice-of-law questions that could arise in the context of a negotiated settlement.

Similarly, if *amici* want to settle, they should be allowed to give up their Seventh Amendment right to a jury trial. This Court has expressly stated that the right to jury trial may be limited or "dispensed with" by "the assent of the parties entitled to it." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (citing *Scott v. Neely*, 140 U.S. 106, 109-10 (1891)). The fact that the district court's class trial plan violated the Seventh Amendment should not preclude *amici* from making an intelligent decision to settle thousands of claims on a classwide basis.

II. RULE 23(e) AND THE DUE PROCESS REQUIREMENTS FOR CLASS CERTIFICATION AND SETTLEMENT ADEQUATELY PROTECT THE RIGHTS OF ABSENT CLASS MEMBERS.

The Third Circuit's reinterpretation of Rule 23 is unnecessary to shield absent class members from collusive settlements. The procedures and safeguards provided by the Due Process Clause and Rule 23 ensure that the interests of absent class members are protected and that "a class action plaintiff is not required to fend for himself." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

In *Shutts*, the Court reviewed the procedures required, as a matter of due process, to protect absent class members. The judge, with the aid of named plaintiffs and the defendant, "conducts an inquiry into the common nature of the named plaintiff's and absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon the proper representation of the absent plaintiffs' interest." *Id.* at 809. This ensures that the named plaintiffs and their counsel share the absent plaintiffs' interests and those interests can and will be vigorously pursued.

Absent plaintiffs must also receive "the best practicable" notice plus an opportunity to be heard and participate—or not participate—in the litigation. *Id.* at 811-12. The notice "describes the action and the plaintiffs' rights in it" for all interested parties so that they can present objections to the court or make an informed decision to opt-out and remove themselves from the litigation. *Id.* at 812. The Court has maintained that these procedures—embodied in the requirements of Rule 23(e)—not only satisfy the Due Process Clause, but protect the interests of absent plaintiffs. *Id.* at 814.

In the factor concentrate litigation, more than 65,000 printed notices were mailed to individuals and organizations in the hemophilia community. In addition to a detailed description of the prior litigation and the settlement terms, these mailed notices and nationally published "summary notices" included a toll-free number to call for further information or legal assistance. The sizable number of filed claim forms—and opt-outs—demonstrates that absent plaintiffs were apprised of the details of the class before deciding to participate in the settlement and waive the right to litigate their claims. Moreover, the district court held an open hearing where it listened to "all persons who indicated a desire to speak" in favor of or in opposition to the settlement. *Amici* App. 18a. When the court does rule on the ultimate question of the settlement's fairness, it can hardly be considered the "rubber stamp" suggested by the Third Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986
93-C-7452

IN RE: FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION

This document relates to: No. 96-C-5024

IMPORTANT LEGAL NOTICE

TO: ALL PERSONS WITH HEMOPHILIA WHO USED BLOOD CLOTTING FACTOR CONCENTRATES PROCESSED OR DISTRIBUTED FROM 1978 THROUGH 1985, AND WHO ARE (OR WERE) INFECTED WITH HIV AND THEIR ESTATES.

PLEASE READ THIS ENTIRE NOTICE CAREFULLY
YOUR LEGAL RIGHTS MAY BE AFFECTED

YOU MAY BE ENTITLED TO RECEIVE $100,000

NOTICE CONCERNING SETTLEMENT

A proposed settlement in a class action lawsuit involving blood clotting factor concentrates is now pending in federal court in Chicago, Illinois and may affect your rights. Please read this Notice carefully.

If you or your family member is a person with hemophilia who used Factor VIII or Factor IX (Factor Concentrates) processed or distributed by any of the Defendants during 1978 through 1985 and are (or were) infected with HIV, you may be eligible to receive $100,000 as a result of the proposed settlement. This settlement may be available to you if you or your family member have a lawsuit pending in federal or state court, *or even if you have not filed a lawsuit*. This Notice describes your rights.

DESCRIPTION OF THE LITIGATION

The Honorable John F. Grady, a Judge of the United States District Court for the Northern District of Illinois, has pending before him numerous cases filed by persons with hemophilia, their HIV infected spouses and children, and their estates. These lawsuits claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX.

The principal defendants in these suits are: ALPHA THERAPEUTIC CORPORATION, GREEN CROSS OF AMERICA CORPORATION and THE GREEN CROSS CORPORATION (collectively. "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHÔNE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL, INC. (collectively, "Baxter"; which also refers to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which also refers to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.). These Defendants are referred to in this Notice as the "Fractionators."

These lawsuits allege that the Fractionators are legally responsible for HIV infections caused by factor concentrates. The Fractionators have vigorously defended these lawsuits and deny any liability.

The Judicial Panel on Multidistrict Litigation consolidated all federal cases before Judge Grady in 1993. Thereafter, Judge Grady appointed a Plaintiffs' Steering Committee to conduct that litigation, including discovery of common issues, on behalf of all of those plaintiffs. Judge Grady has also attempted carefully to coordinate this consolidated federal litigation with the pretrial preparation of similar cases pending in various state courts.

On November 3, 1994, the District Court certified a litigation class action to resolve certain issues which it believed were common to all cases. However, on March 16, 1995, in response to a petition filed by the Fractionators, the United States Court of Appeals for the Seventh Circuit held that these issues were not properly certified as a litigation class action and directed that the class be decertified. On January 16, 1996, the District Court issued an Order decertifying the litigation class.

There has been substantial litigation before Judge Grady concerning the merits of the lawsuits which have been filed against the Fractionators including: examining, analyzing, and classifying over a million pages of the Fractionators' documents; briefing and arguing dozens of discovery and other pretrial motions; obtaining, analyzing and conducting hundreds of depositions, including depositions of the Fractionators' employees, and former employees; conducting extensive investigation, including medical and scientific research, into those common issues in this litigation impacting on any legal responsibility of the Fractionators; and retaining and presenting for deposition testimony medical and scientific experts.

On April 19, 1996, the Fractionators, without admitting liability, and to limit the time, expense and risks of continued litigation, proposed a nationwide settlement of all claims of all members of the Settlement Class (which is described below). In August, 1996, following extensive

negotiations among the Parties, a comprehensive settlement agreement was reached.

Judge Grady has certified a Settlement Class for purposes of considering whether to approve that settlement, which is described in this Notice. If you are a member of the Settlement Class defined below, your rights are affected by this Proposed Settlement. You are eligible to file a claim to participate in this Settlement even if the Fractionators have defenses to your claim, such as the statute of limitations, that might otherwise defeat your claim if you have filed or later file your own separate lawsuit. If you meet the definition of a Settlement Class member as described in the next section of this Notice ("Description of the Settlement Class"), no defenses that a Fractionator may have will play any role in determining whether or not you are eligible for this Settlement.

DESCRIPTION OF THE SETTLEMENT CLASS

The Settlement Class consists of all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to final judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however*, that a person against whom judgment has been entered for lack of prosecution of a claims shall not be excluded for the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of a conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

GENERAL ELIGIBILITY GUIDELINES

The following are merely general guidelines for eligibility and should not be read or understood to contradict the formal class definition outlined above which determines eligibility. To simplify matters, the basic guideline for eligibility is that each HIV infected person is generally eligible to receive $100,000 from the Settlement if he or she used Factor Concentrates processed or distributed by any of the Fractionators during the period 1978 through 1985. Also potentially eligible are persons who contracted HIV through birth, or sexual relations with a spouse or eligible partner who took Factor Concentrates. However, as stated in the class definition, family members of such persons (those who have what the law calls derivative claims) are not separately eligible to receive $100,000, unless they themselves are infected with the HIV virus.

To illustrate, an HIV infected person with hemophilia who used Factor Concentrates processed by any of the Fractionators at any time during the period 1978 through 1985 is eligible to file a claim and, if approved, to receive $100,000 under the Settlement. If his wife is HIV infected as a result of sexual relations with him, she may also file a claim, and if approved, receive a separate $100,000. If they had a child who was also HIV positive through birth, this child would also be eligible to file a claim and, if approved, receive a separate $100,000. However, if the spouse or child is *not* HIV positive, they are part of the "Claimant Group" of the infected father or husband, and cannot file a separate claim for $100,000.

A claim may be also filed on behalf of a person who is deceased. In the illustration above, if the father had

died, the executor of his estate, or his personal representative, can assert his claim. The same $100,000 payment will be made, just as though the father or husband were alive and had filed his own claim form. The same is true for a deceased spouse, or deceased child, who was HIV positive.

It is not necessary that the deceased person have died of AIDS. Death can be from any cause, so long as the deceased person met the definition of an HIV-infected Settlement Class member (paragraphs A, B, or C above).

You are a member of the Settlement Class if you meet the definition on page 2, regardless of whether your already have a lawsuit pending in federal or state court or have never filed any lawsuit. However, if you have filed a lawsuit against one or more of the Fractionators that has gone to judgment in a trial Court, you are probably not a member of the Settlement Class. In addition, this settlement offer is not available to people who choose to continue their lawsuits after the present Notice. *These individuals must choose either to participate in the present Settlement or to opt out and continue with their present lawsuits.*

The Fractionators have agreed that plaintiffs who previously settled claims with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000 are eligible to participate in the present Settlement up to a total of $100,000 (in other words, these individuals can receive the difference, if any, between the total of the previous settlement and $100,000) except that these claimants must be able to show that they used Factor Concentrate processed or distributed in the period 1978 through 1985 by at least one of the Fractionators with which they did not previously settle. For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000, assuming proof of use of Factor Concentrate processed or distributed

by either Baxter or Alpha in the period 1978 through 1985.

PROPOSED SETTLEMENT AND PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND

If you want to participate in this Settlement, you must file a Confidential Claim Form. This Form is included in the documents you received with this Notice. It says: "Confidential Claim Form and Exclusion Form" at the top. You must complete and return the form, postmarked on or before October 15, 1996 to the address indicated. All information you supply will be kept strictly confidential, by Order of the Court, and will not be published or disseminated in any way. It will only be used, under strict and confidential supervision, to determine your eligibility to participate in the Settlement.

The Claim Form is designed so that you can complete it yourself. You do not need a lawyer.

Class Counsel have conducted discovery and investigation into the facts of the pending Lawsuits, have studied the general legal principles applicable to the claims in these Lawsuits, as well as the general legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators in the amount and on the terms set forth in this Notice is fair and reasonable, and is in the best overall interest of the Settlement Class. However, it is also recognized that in those instances where individual lawsuits can be successfully litigated and you are willing, preferably with the advice of an attorney, to assume the risks, the uncertainties, and the delay involved in the outcome of those lawsuits, you might obtain a larger net amount of compensation from an individual lawsuit than the $100,000 that you could receive from the present Settlement. On the other hand, if you pursue your own individual lawsuits, you might recover a lesser net amount

or nothing. This is an individual decision which you must make based on your own circumstances.

Under the Settlement terms, the Fractionators will pay $100,000 for each approved claim, in full and final settlement of the class members' claim. The Claimant (and members of that Claimant Group) will thereafter be barred from any further legal action against the Fractionators and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors concerning Factor Concentrate processed or distributed during the period 1978 through 1985.

If you accept this settlement, the $100,000 payment will *not* have any attorneys fees or costs deducted from it. Any attorney who has represented you will have to make application to Judge Grady for any counsel fee and reimbursement of costs, and any such payments will come from a separate fund which Judge Grady may approve, not from the $100,000 paid to you.

Acceptance of the Settlement will end all claims related to the use of Factor Concentrate that you have, or may have, against the Fractionators. You cannot accept the Settlement, and also file or continue your own lawsuit against Fractionators in either federal or state court. However, acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators (and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecesors and succesors). For example, if you have filed a lawsuit against some party other than the

Fractionators, acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit, especially if the Fractionators were found to be partially responsible for your injuries.

The Fractionators have made the settlement proposal with a desire to achieve substantially complete participation by affected members of the community. Therefore, under the Settlement Agreement, if too many persons decide not to participate, the Fractionators have the right (but are not obligated to) withdraw the Settlement offer. The Confidential Claim Form which has been sent to you includes, at the end, an "Exclusion Form." The "Exclusion Form" must be completed and postmarked on or before October 15, 1996 if you do *not* desire to participate in the Settlement.

The Settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted—in which part or all of the $100,000 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid—and issues relating to Class members' continuing eligibility for government programs such as Medicaid or Medicare payments. If these issues are not satisfactorily resolved, this Settlement will not go forward.

The Settlement is also subject to a decision by Judge Grady as to whether or not to approve the settlement as fair and reasonable to members of the Settlement Class. Judge Grady will make this decision after he conducts a final fairness hearing on the Settlement at the Chicago Federal Courthouse at 9:30 a.m. on November 25, 1996. This hearing, and your rights in connection with that hearing, are described below in the section titled "Final Fairness Hearing."

YOUR RIGHTS AND OPTIONS

If you are a member of the Settlement Class, you have the following rights and options.

A. *Your Right to Participate in the Settlement.*

You exercise this right by completing the enclosed Confidential Claim Form. You do not need a lawyer to file the enclosed Claim Form. The completed form, and all information contained in the form, will be treated as Confidential. *Your Confidential Claim Form must be postmarked on or before October 15, 1996.*

If you choose to participate, and you submit a timely Claim Form and your claim is approved, and if the overall settlement is approved by Judge Grady after the Fairness Hearing (and his Order is upheld and becomes final, in the event an appeal is taken), you will then be eligible to receive a $100,000 payment. Remember, only a single payment can be made to an HIV-infected person. That will end all of your claims against the Fractionators concerning any alleged contamination of Factor Concentrate, and you will not have the right to pursue separate law suits against the Fractionators on such claims.

B. *Your Right To "Opt Out" of the Settlement:*

If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class. If you exclude yourself, you cannot participate in the Settlement described in this Notice, and you cannot receive any of the Settlement Funds. You can, however, pursue your own lawsuit with your own attorney.

To exclude yourself from the settlement class, you must complete the "Exclusion Form" which is enclosed. (It is part of the "Confidential Claim Form and Exclusion Form" package on p. 5.) Print and sign your name, stating that you want to be excluded from the Settlement,

and return the Exclusion postmarked on or before October 15, 1996.

The decision whether to exclude yourself from the settlement class is one that should be made with care, and after considering such factors as: (1) the strengths, merits, and damages potentially recoverable in an individual case, and the risks of losing the lawsuit; (2) your desire to pursue or not pursue individual litigation against the Fractionators, and (3) the value to you of receiving from the Settlement Fund a definite, fixed amount at an earlier time, as opposed to your possible recovery in an individual lawsuit of a different amount in the future (which could be higher, lower or none at all). Each individual may have a greater or lesser chance to succeed in an individual lawsuit depending upon the specific facts of each case, the applicable state law, including the applicable the statute of limitations, and other defenses available to the Fractionators.

If you decide to opt out of the settlement class to pursue your own individual litigation, you (and your individual attorney, if you have one) *MUST* sign a completed Exclusion Form and return it postmarked on or before October 15, 1996, *even if you already have a lawsuit now pending in federal or state court against these Fractionators over the same subject matter.*

C. *Your Right to Support or Oppose the Settlement*

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

D. *Failure to File the Confidential Claim and Exclusion Form:* If you are a member of the Settlement Class described in this Notice, and you "do nothing"—in other

words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class—you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also lose the right to pursue an individual lawsuit against these Fractionators.

FINAL FAIRNESS HEARING

Judge Grady will conduct a Fairness Hearing to determine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois, Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m., Chicago local time. The Hearing may be adjourned without additional notice.

If you exclude yourself from the Settlement Class, this hearing does not concern you and you do not have the right to participate in the Hearing. If you remain a member of the Settlement Class, you have the right, if you choose, to file papers supporting or objecting to the Settlement, and to appear personally or through your attorney at this Hearing to speak in favor of, or in opposition to, the fairness and reasonableness of the proposed Settlement. If you approve of the Settlement, you do not need to attend the hearing and do not need to send papers stating your approval.

If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before October 15, 1996. You must send copies of your statement to each of the following: (1) Clerk of Court of the United

States District Court for the Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois 60604; (2) David S. Sharger, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103; (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa., 17602; and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

ATTORNEYS FEES AND COSTS

Attorneys fees and costs will not be deducted from the $100,000 Settlement amount sent to each eligible claimant who participates in the Settlement, except that if you consult an attorney solely to seek advice on the question of whether to participate in the Settlement, you will be personally responsible for paying that attorney's reasonable charges, if any, for such advice. All other payments will be made from the Cost and Fee Fund established by the Fractionators. The maximum amount of this Fund will be $40 million, plus accrued interest.

If the Settlement is approved by Judge Grady, all requests for attorneys fees and reimbursement of costs—both for members of the Plaintiffs' Steering Committee, and for individual lawyers representing members of the Settlement Class—will require approval by Judge Grady before any such payments of fees will be made.

No fee payments approved by Judge Grady will reduce the settlement payment to Settlement Class members. Applications for costs and fees must be filed of record on September 23, 1996 with the Clerk of Court, United States District Court, Northern District of Illinois Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois, 60604, and will be available for your inspection

there. If you object to any fee request you must file your objection with the Clerk of Court at the above address and send a copy to the individuals listed in the "Additional Information" Section below. Any such objections must be postmarked on or before October 15, 1996.

The Court will also be requested to authorize payment from the Cost and Fee Fund for claims administration and for the costs of notice and similar costs. None of those costs will affect the Settlement amount to be paid to eligible claimants.

EXAMINATION OF PAPERS AND INQUIRIES

The Settlement Agreement has been filed and is available for inspection by any person during normal business hours at the office of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk's Office also has the pleadings, previous orders entered by the Court, and other papers.

Briefs and other papers of the settling parties in support of the Settlement will be filed with the Clerk of Court on or before September 16, 1996. Plaintiffs' Counsel's request for attorney fees and reimbursement of costs and expenses will be filed with the Clerk of Court on or before September 23, 1996. All such documents will be available at the office of the Clerk of Court for your inspection.

ADDITIONAL INFORMATION

ALL QUESTIONS RELATING TO THIS NOTICE MAY BE DIRECTED TO THE FOLLOWING PLAINTIFFS' COUNSEL

David S. Shrager, Esquire
Lead Class Counsel
SHRAGER, MCDAID, LOFTUS,
FLUM & SPIVEY
Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 568-7495 (Fax)

or

Dianne M. Nast, Esquire
Lead Class Counsel
RODA & NAST, P.C.
Suite 301
36 East King Street
Lancaster, Pennsylvania 17602
(717) 397-3669 (Fax)

You may call 1-800-836-9376, if you have questions.

If you know of someone who wants to receive this Notice, please send his or her name to one of the attorneys listed above.

PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION

Dated: August 20, 1996

By: /s/ _____
Clerk of the Court
United States District Court
Northern District of Illinois
Eastern Division
219 South Dearborn Street
Chicago, Illinois 60604

November 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 986
No. 93 C 7452

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION
This Document Relates to: Walker v. Bayer,
96 C 5024

PRETRIAL ORDER NO. 38

On November 25, 1996, a fairness hearing was held on the proposed settlement between the plaintiff class and the fractionator defendants. Various members of the class and other non-attorneys spoke against the settlement and in favor of it, making numerous thoughtful arguments and comments. A number of attorneys also spoke in regard to various aspects of the proposed settlement. All persons who indicated a desire to speak were heard.

As the court explained during the hearing, it is not ready to rule on the question of fairness until it has been determined that by accepting the settlement each eligible class member will in fact receive $100,000.00 net of medical reimbursement claims by insurers and governmental agencies and, further, that they will not jeopardize their entitlement to future medical and disability benefits from Social Security and other sources. Counsel for the defendants and the class will use their best efforts to resolve these questions at the earliest possible time. Toward that end, class members will be sent a letter by December 6, 1996, inquiring as to their eligibility for

governmental programs. This information will be useful in determining what agencies need to be contacted in regard to the protection of future benefits. A copy of the letter should be sent to the court for its information.

There is disagreement as to whether two sets of claimants are included in the class and are eligible for participation in the settlement. One is a group of claimants whose cases were dismissed in Minnesota state court on August 13, 1996. Defendants take the position that since judgment was entered against these plaintiffs, they are, by definition, excluded from the class. These plaintiffs, on the other hand, contend that because they are appealing from the dismissal of their cases, and the judgments are therefore not "final" under Minnesota law, they are eligible members of the class.

The court believes that the appropriate way to determine the rights of these nine claimants is by recourse to the dispute resolution procedures provided for in the settlement agreement, with the court making the final determination if necessary. If the settlement is not approved, then, of course, the question will be moot.

The other eligibility question concerns persons with Von Willebrand's Disease, who claim they are hemophiliacs within the class definition. Defendants dispute this, contending that Von Willebrand's Disease is a separate malady for which defendants' products are neither sold nor recommended. This is another matter which will be moot if the settlement is not approved, and the court believes the way to handle it, if and when the time comes, is by recourse to the dispute resolution procedure under the settlement agreement. As the court indicated at the fairness hearing, it may be necessary for the court to hear expert medical testimony on the issue. Nothing that has been submitted in writing thus far would enable the court to make a determination at this time.

As was emphasized by many of the speakers at the fairness hearing, time is of the essence of this proposed

settlement. The court is sensitive to that fact and is prepared to rule upon the fairness question immediately upon resolution of the reimbursement and entitlement questions noted above.

DATED: November 25, 1996

ENTER: /s/ John F. Grady
JOHN F. GRADY
United States District Judge